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In the Supreme Court of the United States

OCTOBER TERM, 1979

MARVIN MANDEL, ET AL., PETITIONERS

v.

EN BANC COURT OF APPEALS FOR THE FOURTH CIRCUIT, ET AL.

MARVIN MANDEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

HARRY W. RODGERS, III and ERNEST N. CORY, JR., PETITIONERS

v.

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ON PETITIONS FOR A WRIT OF MANDAMUS AND A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The panel decision (Pet. App. 17a-88a)[1] is reported at 591 F.2d 1347. The order of the en banc court (Pet. App. 7a-15a) is reported at 602 F.2d 653. The order denying a further rehearing en banc by an enlarged court (Pet. App. 1a-5a) is reported at 609 F.2d 1076.

JURISDICTION

The judgment of the en banc court was entered on July 20, 1979. The petition for rehearing was denied on November 1, 1979. On November 20, 1979, the Chief Justice extended the time for filing the petitions for a writ of certiorari to and including December 31, 1979, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether affirmance of judgments of conviction by an equally divided en banc court of appeals, following reversal of the judgments by a panel, violates the en banc statute, 28 U.S.C. 46.

2. Whether the trial court improperly instructed the jury on the elements of mail fraud.

3. Whether petitioners' prosecution for mail fraud constituted an impermissible extension of the federal mail fraud statute, 18 U.S.C. 1341.

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[1] "Pet. App." refers to the appendix to the petition in No. 79-1029.

4. Whether the RICO statute, 18 U.S.C. 1961 *et seq.*, applies only to persons involved in organized crime.

5. Whether the forfeiture sanction of 18 U.S.C. 1963 constitutes an impermissible forfeiture of estate.

6. Whether the trial judge improperly admitted hearsay testimony under Fed. R. Evid. 803(24).

7. Whether the trial judge's *Allen* instruction was improper.

STATEMENT

1. Following a jury retrial,[2] petitioner Mandel, then Governor of the State of Maryland, petitioners W. Dale Hess, Harry W. Rodgers, William A. Rodgers, and Irvin Kovens, all Maryland businessmen, and petitioner Ernest N. Cory, a Maryland attorney, were convicted in the United States District Court for the District of Maryland on 15 counts of mail fraud, in violation of 18 U.S.C. 2 and 1341, and on one count of racketeering, in violation of 18 U.S.C. 1962.[3] Mandel

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[2] Petitioners' first trial was aborted because publicity concerning certain jury tampering activities reached the jury. See *United States* v. *Mandel*, 431 F.Supp. 90, 95 (D. Md. 1977). The circumstances surrounding the mistrial are not pertinent to the issues presented here.

[3] Petitioners were indicted as principals and aiders and abetters on 20 counts of mail fraud (Counts 1-20 of the indictment). In various combinations, petitioners were also indicted on four counts of racketeering (Counts 21-24 of the indictment). Prior to trial, the court dismissed one racketeering count (Count 22). The jury acquitted petitioners of three mail fraud counts (Counts 5, 6, and 14). After trial, the court entered judgments of acquittal on two mail fraud counts and one racketeering count (Counts 19, 20 and 23).

was sentenced to four years' imprisonment. Hess, Harry Rodgers and Kovens were sentenced to four years' imprisonment and fined $40,000. William Rodgers was sentenced to 20 months' imprisonment and fined $40,000. Cory was sentenced to 18 months' imprisonment. In addition, pursuant to 18 U.S.C. 1963 (a), Hess, Kovens, the Rodgers brothers and Cory were ordered to forfeit ownership interests in Southern Maryland Agricultural Association, Inc., the corporate owner of the Marlboro and Bowie racetracks. The en banc court of appeals affirmed (Pet. App. 6a).

2. The substance of the mail fraud alleged in the indictment was that beginning in early 1969, and continuing until the date of the filing of the indictment, petitioners devised a scheme to defraud the citizens of Maryland through bribery, misrepresentation and the concealment of material facts, and thereafter used the mails to facilitate the scheme (Pet. App. 19a). In particular, the indictment charged that between 1972 and 1975, petitioners concealed from the Maryland General Assembly and the State Racing Commission the identities of the true owners of Marlboro Racetrack, causing the legislators and the Racing Commission to make decisions beneficial to them; that in his capacity as governor, petitioner Mandel received bribes from the other petitioners in return for his assistance in obtaining legislation favorable to the Marlboro Racetrack; and that Mandel, without revealing his business involvements with the other petitioners, permitted and approved the award of various benefits to business entities in

which they held financial interests. *United States* v. *Mandel*, 415 F. Supp. 997, 1004 (D. Md. 1976) (order denying motion to dismiss indictment).

a. The government's evidence showed that in February 1971 the owners of the Marlboro Racetrack (who at that time did not include petitioners) contracted with the owners of Hagerstown Racetrack for the transfer to Marlboro of 18 racing days allotted to Hagerstown. Since the horse racing business is regulated by the State of Maryland, the proposed transfer of racing days required the approval of the state legislature. In April 1971, the Maryland General Assembly passed House Bill 1128, which authorized the transfer of racing days to Marlboro. However, after receiving advice that the bill was unconstitutional, Mandel vetoed it (Pet. App. 21a-22a).

Following this veto, the owners of Marlboro sold the racetrack to a group of undisclosed clients, represented by petitioner Cory. The group consisted of petitioners Hess, the Rodgers brothers and Irving Schwartz, a longtime business associate of Kovens (Pet. App. 22a). Schwartz, the only purchaser whose identity was known to the sellers, was in fact a front man for Kovens, who secretly provided much of the funding for the purchase (Pet. App. 22a; Tr. 4065, 4069, 4077-4081, 4085-4086, 4094-4095, 6057-6059, 6061, 6065, 6551-6552, 6637-6663, 6667-6675).[4]

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[4] Unless otherwise noted, "Tr." refers to the transcript of petitioners' second trial. "App." refers to the joint appendix filed in the court of appeals.

Shortly after the purchase was consummated, the purchasing group, still withholding their identities from the Maryland Racing Commission, chose Eugene Casey to represent himself as the new owner of Marlboro (Tr. 4318-4319, 4323). Casey publicly announced his purchase of Marlboro on January 1, 1972. A week later, Casey and Cory sent a letter to the Maryland General Assembly advising of Casey's recent acquisition of Marlboro and requesting that Mandel's veto of House Bill 1128 be overriden (Pet. App. 22a; Tr. 4420-4422).

While there was no direct evidence that petitioner Mandel knew the identity of Marlboro's new owners, there was strong circumstantial evidence of his knowledge, including his intense interest in Maryland racing and his close personal relationships with several of the purchasers (Tr. 1705-1716, 8271-8275, 8609-8610, 8629-8631, 8678-8691). In addition, the day before the Marlboro sale was consummated, ten separate telephone calls were placed from Mandel's office to the office of the insurance agency owned by the Rodgers brothers (Tr. 9200). The evidence showed that immediately after the purchase of Marlboro by the other petitioners, Mandel lent his personal support to two pieces of legislation highly beneficial to the racetrack, including House Bill 1128, which he had previously vetoed. During the process of deliberating and voting on whether Mandel's veto of House Bill 1128 should be overriden, Mandel's aides conspicuously failed to lobby in support of his veto as they normally did. State Senate members openly discussed the Governor's lack of support for his own

veto. Moreover, Mandel's chief legislative spokesman, Senator Roy Staten, told several of his senate colleagues that Mandel would like his veto of House Bill 1128 overriden or would not object to an override (Tr. 4843; Pet. App. 23a, 79a-80a). Against this background, on January 12, 1972, the General Assembly overrode the governor's veto of House Bill 1128 by a broad margin, with most of Mandel's supporters in the majority (Pet. App. 79a).

Two months later, the Mandel administration introduced in the Maryland legislature a bill that would consolidate Maryland racetracks and, in so doing, provide substantial benefits to the owners of Marlboro (Pet. App. 23a). In singling out Marlboro for special treatment, the bill went considerably beyond previous consolidation efforts. The Mandel Administration worked hard for the bill's passage, and Mandel personally lobbied legislators to support it (Tr. 4633-4639, 4878, 5051, 5318-5324, 5609, 5682, 5779, 5895-5903, 7621). The consolidation bill was embroiled in controversy from the start because of the large windfall it provided to Marlboro and because of persistent rumors concerning the identities of Marlboro's true owners. In view of this, the Senate Finance Committee requested the State Racing Commission to determine the true identities of the track's new owners. Responding to a specific Commission inquiry, Cory concealed the identities of Hess, Kovens and the Rodgers brothers as the beneficial owners (Tr. 4652-4655). Kovens also sent a telegram to the finance committee denying any involvement with Marlboro

(Tr. 5389-5390). Although the consolidation bill was passed by the Senate and the House of Delegates in an amended form still highly favorable to Marlboro, it was finally defeated on the last night of the legislative session (Tr. 5030-5036; Pet. App. 24a). Ten state senators later testified that knowledge of the identities of the undisclosed owners, as well as Mandel's relationship with them, would have been directly relevant to their deliberations both on the racetrack consolidation bill and on their vote to override the veto of House Bill 1128 (Tr. 5077-5078, 5624-5627, 5685-5687, 5780-5783).

b. At the same time that Hess, the Rodgers brothers and Kovens secretly purchased Marlboro (December 1971), Hess and the Rodgers brothers secretly conveyed to Mandel a 15% interest in Ray's Point, Inc., a 200 acre parcel of highly desirable real estate on Maryland's eastern shore. That interest, which was worth approximately $45,000, was given to Mandel for a total consideration of $150. Unlike all but one of the others, Mandel was not obligated on the mortgage (Pet. App. 26a; Tr. 1873-1875, 1892, 1898, 2123).[5] Documents formaliz-

[5] The objective of the Ray's Point venture was to develop the waterfront real estate and sell individual lots at a substantial profit (Tr. 1771-1778, 1874). Harry Rodgers testified that the venture was designed to yield to each participant a profit of at least $35,000 (Tr. 10132-10133). Hess explained to another Ray's Point partner, Nathan Cohen, that he and the Rodgers brothers "take care of" Mandel in various ways, including allowing him to participate in business ventures without his name appearing in any public record (Tr. 1883-1884).

ing this arrangement were drafted during the early months of 1972, while the legislature was considering legislation beneficial to Marlboro. Although the original corporate minutes listed the names of all the shareholders, William Rodgers ordered the preparation of revised minutes omitting the name of Mandel. In addition, Mandel's participation in the venture was concealed from bank officials and other persons dealing with the Ray's Point venture, as well as from the general public (Tr. 1898-1906, 1785, 2120, 2123; Pet. App. 26a).

In March 1972, Hess became a 9% partner in another venture, Security Investment Company, a real estate partnership in which the Rodgers brothers also had an interest. The partnership leased two office buildings to the Social Security Administration for more than $1.3 million annually (Tr. 2290, 2291, 2295, 2298, 2301-2302, 2418; Pet. App. 26a). While the racetrack consolidation bill was pending, Hess secretly assigned to Mandel a 4% interest in Security Investment, keeping 5% for himself. Although the assignment was formalized in May 1972, Mandel knew before then that he would receive the assignment, which was valued at approximately $140,000 (Pet. App. 26a-27a; Tr. 2337, 2426, 2686-2688, 2692-2693, 8515-8516, 8524-8525). Beginning in May 1972, Hess sent Mandel monthly income checks stemming from his interest in Security Investment (Tr. 2522-2527). Mandel reported these sums on his tax returns as

"dividends" and later as "legal fees" (Tr. 2818, 2843, 2875-2876).[6]

In addition to receiving interests in these two real estate ventures, Mandel received other lavish gratuities from the other petitioners during the period encompassed by the indictment, including several thousand dollars worth of clothing (Tr. 3036-3039, 3238),[7] and jewelry costing nearly $8,000 for his wife (Tr. 3999, 3405) and son (Tr. 3441-3445, 3457-3458). On one occasion, Hess paid for a $3,300 diamond ring for Mandel's son with cash delivered to the jeweler at a New York airport in a paper bag (Tr. 3446-3455). Mandel and his family also received

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[6] Mandel and Hess agreed that Mandel should report these monthly payments as part of an attorney's fee Hess owed Mandel. Accordingly, Mandel reported these funds on his 1973 tax return as "fees" (Tr. 2843). Hess also told an accountant preparing his income tax return that monies paid by him to Mandel were legal fees (Tr. 2552, 2559; Pet. App. 27a). To substantiate this claim, Hess directed his secretary in 1974 to prepare a letter asserting that he owed a $15,000 legal fee to Mandel. The letter was falsely dated March 22, 1968, and was typed on a typewriter Hess had used during 1968 in order to make it appear as if it had been executed prior to Mandel's assumption of office as governor (Tr. 2682-2686). A copy of the letter was then sent to the accountant to substantiate a legal fee deduction. Hess also directed his secretary to rewrite his 1972 and 1973 cash disbursement journals and check stubs by substituting the term "legal fees" for the original "Sec. Inv." on entries describing disbursements to Mandel (Tr. 2665, 2676).

[7] In one instance, the clothing was paid for by checks drawn on the Charlestown Racetrack, which was principally owned by Kovens; the track's records described the purchases as uniforms for the track security guards (Tr. 3209, 3281-3291, 3317-3325, 3346-3361; Pet. App. 25a).

travel and vacations at a Florida resort paid for by Harry Rodgers (Tr. 3036-3040, 3237-3238). In addition, Kovens provided over $100,000 worth of bonds with which to finance Mandel's 1973 property settlement following his divorce (Tr. 3859, 3936, 3941). Over $40,000 needed for alimony payments was also made available to Mandel by Hess and Harry Rodgers through a chain of four "middlemen" who wrote checks to one another. The last individual in the chain, who signed a check made payable to the govenor of Maryland, was a motorcycle salesman who had never met Mandel (Tr. 3551-3553, 3570-3573, 3733-3743, 8801-8807).

c. After the consolidation bill failed to pass in the General Assembly, the petitioners who secretly owned Marlboro continued to conceal their interests from the Maryland Racing Commission. Thus, Cory and Harry Rodgers assembled a group of front men whose names were submitted by Cory in a July 1972 letter to the Commission as those of the new stockholders. In fact, the named individuals were mere nominees who possessed no ownership interest in the track (Tr. 6431-6435, 6440-6444, 6615-6616; Gov. Exh. 12 (App. 2927)). Prior to appearing before the State Racing Commission, Cory also removed a page from the Marlboro stock book that showed the actual ownership of the shares (Tr. 6610-6611). Finally, to complete the deception, he provided the same false information to an official of the Thoroughbred Racing Protective Bureau, to the publisher of a Maryland racing magazine, and to a State Assistant At-

torney General (Tr. 5215-5222, 5399-5408, 6092-6093, 6265-6266; App. 2924, 2930, 2972-2974). With a total lack of accurate information, the Maryland Racing Commission thereafter granted Marlboro a series of benefits, including the award of choice racing dates, which furthered the economic interests of Hess, the Rodgers brothers, Kovens and Cory (Tr. 6134-6163).

In December 1972, the owners of Marlboro considered the advisability of merging with Bowie Racetrack, a larger, more successful enterprise (Tr. 6876). Hess and the Rodgers brothers were informed by their attorney that full disclosure of Marlboro's actual ownership should be made to the Racing Commission in the course of effecting the merger. Hess and the Rodgers brothers decided to consult with Mandel to determine whether such disclosure should be made. Hess later reported that Mandel vigorously opposed disclosure—that "Mandel has scotched coming clean" about the true ownership of Marlboro (Tr. 6938, 6942, 6954-6957).

On December 28, 1972, the Marlboro and Bowie tracks were merged (Pet. App. 24a). Instead of revealing the true ownership interests in the enterprise, the stock of Marlboro and the assets of Bowie were transferred to a newly-chartered corporation, Southern Maryland Agricultural Association, Inc., with the former owners of Marlboro receiving 30% of the stock in the new company (Pet. App. 24a-25a). Hess and the Rodgers brothers then ostensibly transferred their interest to Cory by use of an agreement

that included a non-recourse note. Under the terms of the transfer, the stock would revert to Hess and the Rodgers brothers if Cory were unable to pay the $630,000 purchase price within five years (Tr. 6977-6979; Pet. App. 25a). In a report furnished in response to a Racing Commission request regarding ownership of the Marlboro-Bowie entity, Cory was lisited as the owner of the portion of the enterprise formerly owned by Hess and the Rodgers brothers (Tr. 6159-6160). Schwartz and Casey also testified before the Senate Finance Committee that they were the true owners of Marlboro and that Hess and Kovens had never been owners of the track. In the aftermath of these false representations, the Maryland legislature authorized the transfer of Marlboro's racing days to Bowie. This substantially achieved the results sought in the 1972 consolida ion bill and resulted in large profits for the still undisclosed owners of the merged Marlboro-Bowie entity (Tr. 5071-5073, 5622, 6157).

In February 1975, the day after a meeting with an Assistant United States Attorney investigating the Marlboro racetrack, Cory notified the secretary of the merged entity of the ownership interests retained by Hess and the Rodgers brothers. This disclosure also appeared as a footnote to an annual audit report concerning Maryland racetracks. During a series of press conferences, Mandel denied knowing prior to publication of the audit that his friends possessed an ownership interest in Marlboro (Tr. 7169-7209, 8007).

3. A panel of the court of appeals reversed petitioners' convictions, with one judge dissenting. The panel held that the trial court's charge to the jury was deficient because it failed to give a bribery instruction in connection with the mail fraud counts and failed expressly to instruct that Mandel could not be convicted of mail fraud on a misrepresentation theory unless the jury found that he knew that the other petitioners were the true owners of Marlboro Racetrack (Pet. App. 42a-45a). The panel also held that testimony by several state senators, which repeated statements by out-of-court declarants concerning Mandel's views on racetrack legislation, was inadmissible hearsay (Pet. App. 48a-53a).[8]

After issuance of the panel decision, the government filed a petition for rehearing with a suggestion for rehearing en banc. On April 16, 1979, a majority of the judges eligible to vote granted that request, ordering that "the above cases will be reheard at the June 1979 Session" (79-1028 Pet. 10 n.3). On July 20, 1979, a six-judge en banc court affirmed petitioners' convictions by equal division with the following order (Pet. App. 7a):

> The judgments of conviction are affirmed by an equally divided court.
>
> A majority of the members of the en banc court would affirm the judgments of conviction against all of the contentions of the appellants

[8] The panel majority also held that it was error for the court to admit certain portions of the Maryland Code of Ethics as circumstantial proof of Mandel's intent to defraud (Pet. App. 45a).

> except the claim of error in the charge to the jury which was the point upon which there was equal division.

The judgment of the en banc court stated that "[i]t is * * * ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed" (Pet. App. 6a).

After the seating of two newly appointed judges, petitioners filed a "Petition for Rehearing with Suggestion for Rehearing Before A Fully Constituted Court in Banc." The court of appeals, this time composed of eight voting members, denied the motion by equal division (Pet. App. 1a-5a).

ARGUMENT

1. In the petitions for mandamus (79-1028 Pet. 14-30) and certiorari (79-1029 Pet. 18-20; 79-1030 Pet. 14-19), petitioners contend that the en banc statute, 28 U.S.C. 46, requires concurrence by a majority of participating judges to render a judgment inconsistent with a panel decision, and thus that the effect of the equal division of the en banc court in this case was not to affirm the trial court's judgment but to affirm the reversal of that judgment by the panel. This claim is without merit. The law on this subject is well settled, and there is no need for review by this Court.

At the outset, we note that the text of the en banc statute lends no support to petitioners' argument. The statute simply provides that "[c]ases and controversies shall be heard and determined by a court or

division of not more than three judges, *unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.*" 28 U.S.C. 46(c) (emphasis supplied). Thus, the statute specifies only the vote necessary for making the threshold determination whether to rehear a case en banc.[9] The statute does not prescribe the number of votes ultimately required to effect affirmance of the judgment of an inferior court by an en banc court. As this Court recently noted, "voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc, which is essentially a policy decision of judicial administration." *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 627 (1974) (emphasis in original); see also *Western Pacific R.R. Corp.* v. *Western Pacific R.R.*, 345 U.S. 247, 261-262 (1953).

Indeed, while a majority vote is necessary to grant rehearing en banc, it is well settled that, once this determination has been made by the requisite vote, equal division by the en banc court, following a panel decision, results in affirmance of the judgment of the district court as a matter of law. See, *e.g.*, *United States* v. *Geders*, 585 F.2d 1303, 1305-1306 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979);[10]

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[9] The statute was satisfied in all respects in this case because a majority of the active members of the court eligible to vote cast their votes to rehear the case en banc. See 79-1028 Pet. 10 n.8.

[10] In *Geders*, the panel reversed the judgment of conviction of the district court. A majority of the active members of the court of appeals subsequently voted to rehear the case

United States v. *Clavey*, 578 F.2d 1219 (7th Cir.), cert. denied, 439 U.S. 954 (1978); *Farrand Optical Co.* v. *United States*, 317 F.2d 875, 885-886 (2d Cir. 1962); *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers*, 294 F.2d 399, 400 (2d Cir. 1961), aff'd on other grounds, 370 U.S. 254 (1962);[11] *Kimes* v. *United States*, 516 F.2d 377, 378 (4th Cir. 1975); *United States* v. *Acosta*, 509 F.2d 539 (5th Cir.), cert. denied, 423 U.S. 891 (1975); *United States* v. *Walden*, 464 F.2d 1015, 1016 (4th Cir.), cert. denied, 409 U.S. 867 (1972); *ITO Corp. of Baltimore* v. *Benefits Review Board*, 542 F.2d 903, 905 (4th Cir. 1976), cert. denied, 433 U.S. 908 (1977); *United States* v. *Holmes*, 537 F.2d 227, 228 (5th Cir. 1976).

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en banc with no explicit vacation of the panel decision. 566 F.2d 1227, 1235. Sitting en banc, the court subsequently held: "the court en banc is evenly divided; therefore, the judgment of conviction of the district court is affirmed by operation of law." 585 F.2d at 1305-1306.

[11] Petitioners incorrectly attempt to distinguish *Drake Bakeries* by arguing that in order "[t]o effectuate an affirmance of the district court's order, one of the three judges who voted to reverse the district court changed his vote to produce a 4-2 vote to withdraw the panel decision" (79-1028 Pet. 27 n.8). However, the court was evenly divided on the merits of the issue. Four of the six members agreed that the tie vote resulted in affirmance of the decision of the district court. 294 F.2d at 400. One of the two dissenters, Judge Friendly, apparently later changed his view concerning the effect of a tie vote. See *Farrand Optical Co.* v. *United States*, supra, 317 F.2d at 886; 77 Harv. L. Rev. 767, 768 & n.7 (1964) ("the full bench supplants the panel for the purpose of rehearing the appeal").

This consistently recognized principle is, moreover, a manifestly sensible and proper rule. Once the full court has undertaken to rehear the case, it would be irrational to ascribe greater weight to the vote of some members of the court than to others, simply by virtue of the fortuity of their assignment to the original panel. An equal division of the en banc court of appeals means that a majority of the judges to have passed upon the issue (including the district judge) were in agreement with the ruling from which the appeal was taken. In such circumstances, that ruling should be upheld.

Petitioners nonetheless contend (79-1028 Pet. 26-29) that this principle is inapplicable here because the en banc court never expressly vacated the intervening panel decision. That argument is also insubstantial. The determination by a majority of the members of the court to rehear the case en banc itself vacated the panel decision. As Judge Waterman explained in *Farrand Optical Co.* v. *United States*, *supra*, 317 F.2d at 886 (dissenting on other grounds) (emphasis supplied):

> *It is obvious that when a court of appeals in any case determined by a panel grants a rehearing of the case before the court sitting in banc, the full bench of its judges supplants the panel, i.e., "court or division" of three judges, that first heard and determined the controversy.* So I agree with my colleagues that an in banc court does not sit as an appellate court of review over its own panels. If such were so, the result

reached here by the panel would not have been disturbed.

See also *United States* v. *Gutierrez-Barron*, 602 F.2d 722, 723 (5th Cir. 1979); *United States* v. *Clavey*, *supra*.[12] Petitioners suggestion that the en banc court is reviewing the judgment of the panel and not that of the district court is in fact inconsistent with the terms of Fed. R. App. P. 35(a), which states that "[a] majority of the circuit judges * * * may order that an *appeal* or other proceeding be heard or re-

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[12] There is no merit to petitioners' assertion (79-1028 Pet. 24; 79-1030 Pet. 15-16) that the per curiam order in *Bulluck* v. *Washington*, 468 F.2d 1096, 1122 (D.C. Cir. 1972), conflicts with the foregoing decisions. In *Bulluck*, the district court dismissed the complaint. A panel of the court of appeals affirmed. The court subsequently granted rehearing en banc. The vote of the en banc court was evenly divided. So divided, the court concluded that it could not disturb the "judgment of affirmance." Thus, the evenly divided court effectively affirmed *both* the district court and the panel. That situation is plainly different from the situation here, where the panel reversed the district court. The court in *Bulluck* was not faced with the question presented in this case whether an equal division of the en banc court results in an affirmance of the district court or of the panel's reversal of the district court. If such a question were raised in the District of Columbia Circuit in a future case, there is no reason to infer that the court would reject the consistent line of authority summarized above, which requires affirmance of the district court's decision.

Petitioners' reliance (79-1028 Pet. 24) upon this Court's decision in *Carmichael* v. *Eberle*, 177 U.S. 63 (1900), to support their claim that equal division on the merits is tantamount to denial of a rehearing is misplaced. In *Carmichael*, unlike the instant case, a majority of the judges failed to concur in the threshold question whether a rehearing should be granted. *Id.* at 65-66.

heard by the court of appeals in banc" (emphasis supplied). Since it was petitioners' appeal and not the government's rehearing petition that was being reheard, it was petitioners who had to command a majority of the en banc court to prevail. Indeed, while the en banc court here was equally divided on the merits of one issue, there is no question that the court was other than unanimous in the view that its equal division resulted in an affirmance of the judgment of the district court. See also *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers, supra*, 294 F.2d at 400.[13]

Nor is a different result required because the Fourth Circuit has not promulgated a rule prescribing the effect of a decision rendered by an equally divided en banc court. Although this Court has re-

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[13] As previously noted, a majority of the court of appeals voted to "rehear the case" en banc. The entire court subsequently subscribed to an order and judgment providing expressly that the decision of the district court was affirmed. In these circumstances, the failure of the majority to state that the panel decision was "vacated" when it voted to rehear the case cannot have significance. The entire court has held that the panel decision is superseded and the district court judgment reinstated.

As this Court noted in *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1869), "[t]he statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. * * * [T]he judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case."

quired the promulgation of procedural rules necessary to apprise litigants of how to invoke the court's en banc jurisdiction (*Western Pacific R.R. Corp.* v. *Western Pacific R.R.*, *supra*, 345 U.S. at 261-262, 267-268), there is no requirement that a rule specify the legal effect of an en banc decision vis-a-vis an earlier panel decision. This is a matter of judicial administration governed by the case law summarized above and does not implicate the rights of litigants in petitioning for en banc review. Hence, the adoption of rules is not essential.[14]

Petitioners' argument is not aided merely because some circuits have discussed in court publications the effect of granting rehearing on a preceding panel decision. Rather than announcing rules on this subject, the various court publications upon which petitioners rely (79-1028 Pet. 26 n.6) merely recognize the prevailing practice in the circuit. Moreover, the practice recognized in these publications is no diffent from that which governed here. For example in *United States* v. *Gutierrez-Barron*, *supra*, the Fifth Circuit acknowledged that its local Rule 17 (effec-

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[14] Contrary to petitioners' assertion, an explanatory rule is not necessary to caution "judges of those circuits to vote for rehearing only in those cases in which they determine * * * that the panel judgment must be set aside" (79-1028 Pet. 26-27). As this Court explained in *Western Pacific R.R. Corp.* v. *Western Pacific R.R.*, *supra*, 345 U.S. at 262-263:

> The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court.

tive October 20, 1979), which provides that "the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of this court", simply "codifi[ed] * * * longstanding practice" (602 F.2d at 723). Likewise, the Seventh Circuit's *Practitioner's Handbook for Appeals* (1979) does not purport to promulgate a procedural rule at all, but simply explains the well established doctrine that "[t]he order granting rehearing in banc vacates the panel decision so that if the court in banc should be equally divided, the judgment of the district court and not the judgment of the panel will be affirmed." *Id.* at 48. This pronouncement is merely a codification of prior practice in the Seventh Circuit. See *United States* v. *Clavey*, *supra*.

Petitioners can hardly claim prejudice from the Fourth Circuit's failure to publish its internal operating procedures.[15] The en banc court's affirmance of the district court's judgment comported with the well established practice in the Fourth Circuit. See *ITO*

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[15] There is no merit to petitioners' suggestion (79-1028 Pet. 12; 79-1029 Pet. 19) that the decision of the en banc court considered only the claims raised in the government's rehearing petition and did not encompass the other questions presented to the panel. As petitioners acknowledge (79-1028 Pet. 12), the order of the en banc court states unequivocally that "'[a] majority of the members of the *en banc* court would affirm the judgments of conviction against *all* of the contentions of the appellants' except the claim of error in the charge to the jury which was the point upon which there was equal division" (Pet. App. 79a) (emphasis supplied). Nothing in the court's order suggests that, contrary to this plain language, it encompassed less than all the issues originally presented in the appeal to the panel.

Corp. of Baltimore v. *Benefits Review Board, supra*; *Kimes* v. *United States, supra; United States* v. *Walden, supra.*[16]

2. At trial, petitioners requested the trial judge to instruct the jury that, in order to return convictions on the mail fraud counts, it was necessary to find that Mandel had been bribed in return for aiding legislation favorable to racetrack interests (79-1029 Pet. 26; App. 106, 122, 253-254).[17] Although the trial judge thoroughly explained the concept of "bribery" in connection with the portion of his instruction

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[16] To the extent that petitioners are contending that it is inappropriate to uphold a criminal conviction when the affirming court is evenly divided, we note that this Court has recognized the propriety of reaching that result. See, *e.g.*, *Biggers* v. *Tennessee*, 390 U.S. 404 (1968) (conviction and 20 year prison sentence affirmed by equally divided court).

[17] Mandel's proffered jury instruction exemplifies the charge petitioners sought with respect to bribery (App. 106; emphasis supplied):

> The indictment in this case charges that the Defendant Mandel schemed to defraud the citizens of the State of their right to his conscientious, loyal, faithful, disinterested and unbiased services as Governor. * * * *Unless you find, beyond a reasonable doubt, that the Defendant Mandel accepted interests in the two business ventures which I have named, Ray's Point, Inc. and Security Investment Company, as bribes for aiding and assisting legislation and legislative matters financially beneficial to Marlboro, you may not find that the Defendant Mandel participated in a scheme to defraud the citizens of the State of their right to his conscientious, loyal, faithful, disinterested and unbiased services.*

dealing with the racketeering counts,[18] he declined to repeat the bribery definition in connection with the mail fraud counts. In addition, Mandel proffered an instruction stating that, in order to convict him of mail fraud, it was necessary for the jury to find that he had actual knowledge that his co-defendants were the beneficial owners of the Marlboro Racetrack. Instead of instructing in these precise terms, the court charged that Mandel could not be convicted of this offense unless he had knowingly participated in the scheme to defraud alleged in the indictment (Tr. 11489, 11490, 11492). Petitioners contend (79-1029 Pet. 20-23, 26-27; 79-1030 Pet. 26-30) that the trial court erred in refusing their proffered instructions regarding the mail fraud counts and in failing to repeat the definition of bribery in connection with the mail fraud counts.

a. Petitioners' contention (79-1029 Pet. 21; 79-1030 Pet. 27-30) that the trial judge erred in failing to give a bribery instruction in connection with the mail fraud counts is without merit and does not warrant further review. Bribery is not an essential

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[18] Counts 21 and 23 of the indictment (App. 79, 83) alleged that petitioners engaged in racketeering activities, *inter alia*, through violations of the Maryland bribery statutes (Count 21 para. 4(b), Count 23, para. 4(b)).

element of the offense of mail fraud, even when the fraud involves abuse of a position of public trust. See generally *United States* v. *Bush*, 522 F.2d 641, 651-653 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *Pereira* v. *United States*, 347 U.S. 1, 8 (1954) ("The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme"). As petitioners concede (79-1029 Pet. 21, 28), the indictment alternatively alleged that petitioners violated the mail fraud statute through misrepresentations and concealment as well as through bribery (App. 53). Thus, because petitioners' proffered jury instruction (see note 17, *supra*) required the jury to find bribery beyond a reasonable doubt in order to return convictions on the mail fraud counts, it was clearly erroneous and properly rejected. "A trial judge is under no obligation to give a requested instruction that misstates the law * * * or has been covered adequately by other instructions." *United States* v. *L'Hoste*, 609 F.2d 796, 805 (5th Cir. 1980); see *United States* v. *Park*, 421 U.S. 658, 674-675 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).[19]

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[19] Petitioners claim (79-1029 Pet. 26) that the government took inconsistent positions with respect to bribery under the mail fraud counts. More specifically, they claim that throughout the trial the prosecution emphasized bribery in connection with those counts but at the conclusion of the trial abandoned the bribery theory. This contention misdescribes the government's position. The government simply sought to make clear during the hearing on instructions and the jury argument

At all events, the trial judge's instruction, when considered in its entirety (*United States* v. *Park*, *supra*, 421 U.S. at 674-675), provided an adequate definition of bribery to the extent that the jury may have found part of the fraud to consist of secret bribery. Thus, the trial judge fully explained the term bribery in connection with the racketeering counts and elaborated upon the necessity of receiving a gift, benefit, or favor as a *quid pro quo* for favorable official acts (Tr. 11502-11507).[20] As this Court held in *United*

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that, while its theory on these counts *included* bribery as one of the ways in which the fraud was committed, finding bribery in violation of state law was not essential to returning a mail fraud conviction (Tr. 11256-11257, 11382). The government clearly did not abandon the bribery theory. When the government presented a summary of its theory of the case to the court to facilitate jury instructions, it expressly stated that its theory encompassed receipt of rewards by Mandel in anticipation of and in return for various official acts. That theory was clearly explained by the court to the jury (Tr. 11527).

[20] Portions of the court's instruction are set out in the opinion of the dissenting panel member (Pet. App. 68a-70a). The court's charge described the government's bribery theory in connection with both the mail fraud and racketeering counts of the indictment. The court explained that the indictment alleged that the defendants had devised a scheme to defraud the citizens of the State of Maryland of their right to honest government "free from bribery" (Tr. 11473-11474). The court also described the specific benefits that allegedly flowed to petitioner Mandel in exchange for official acts (Tr. 11475-11481). When the court summarized the government's theory under the mail fraud counts of the indictment, it again referred to petitioners' alleged involvement in bribery (Tr. 11525-11528; see also *id.* at 11530-11531, 11534). As previously noted, the term "bribery" was fully and accurately defined by the trial judge when he discussed the racketeering

States v. *Bayer*, 331 U.S. 532, 536 (1947), once an instruction is properly given its repetition is a matter residing within the discretion of the court. See *United States* v. *Haldeman*, 559 F.2d 31, 115 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Honea*, 556 F.2d 906, 908 (8th Cir. 1977). This is especially true when the government offers the same evidence to prove more than one offense in a multi-count indictment. In the present case, "proof of the same gifts to Mandel * * * and the same favors he bestowed" was relied upon "to prove both the mail fraud counts and the racketeering counts" (Pet. App. 70a-71a).[21]

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counts of the indictment (Tr. 11502-11507). Significantly, petitioners' counsel argued at length to the jury that bribery was central to the government's case and that the government had failed to prove bribery (Tr. 11060-11061, 11066, 11120-11121, 11270, 11339-11340, 11343). Under these circumstances, petitioners can hardly contend that the bribery issue was not fairly presented to the jury, that the concept was inadequately defined, or that the theories of defense counsel and the prosecutor were not clearly set forth.

[21] While not claiming insufficiency of the evidence, Harry Rodgers contends (79-1030 Pet. 26-27) that failure to define bribery in connection with the mail fraud counts was prejudicial in his case because there was little evidence that he gave Mandel benefits in exchange for assistance on racetrack legislation. This assessment of the evidence is erroneous. To the contrary, the evidence showed that Harry Rodgers, his brother and Hess secretly transferred to Mandel an interest in the Ray's Point real estate venture almost contemporaneously with the legislature's consideration of the veto override and the introduction by the administration of the consolidation bill (see pages 8-9, *supra*; Pet. App. 25a-26a). Additionally, as Rodgers concedes (Pet. 7-8 n.10), the evidence also

b. The court's instruction also adequately conveyed Mandel's defense theory that he lacked actual knowledge of his co-defendants' interests in Marlboro Racetrack and thus lacked specific intent to defraud. There is, of course, no requirement that the jury be charged in the precise language urged by the defense. See, *e.g.*, *United States* v. *Newson*, 531 F.2d 979, 983 (10th Cir. 1976). Here, the court specifically and repeatedly instructed that a scheme to defraud requires proof beyond a reasonable doubt of "intentional use of false or fraudulent representations." The judge further explained that the purpose of requiring knowing misconduct "is to ensure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason" (Tr. 11489-11492; Pet. App. 71a). Moreover, in describing the government's theory of the case, the court instructed that the government must prove that "the six Defendants all knowingly entered with one another into a scheme to defraud," and "that Mandel knowingly promoted the interests of his friends" (Tr. 11525-11527; Pet. App. 71a). Finally, in giving instructions concerning petitioners' theory of the case, the court carefully described Mandel's defense that he knew nothing about the actual ownership interests

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showed that during the 1972 legislative session he purchased clothing and jewelry for Mandel. The close proximity between these gifts and efforts by the administration to secure passage of legislation favorable to Marlboro Race Track—as well as the secrecy with which the transfers were effected—clearly permitted the inference that the gifts were, in fact, bribes.

of Marlboro during the 1972 legislative session (Tr. 11530-11531).[22]

In sum, "viewed as a whole and in the context of the trial" (*United States* v. *Park*, *supra*, 421 U.S. at 675), the charge was sufficient to submit Mandel's theory of defense to the jury.

3. Petitioners also claim (79-1029 Pet. 28-29; 79-1030 Pet. 19-26) that, to the extent that the government relied on a theory of fraudulent concealment, the reach of the federal mail fraud statute was impermissibly extended here. Specifically, they contend that concealment of the identity of the owners of the racetrack was not prohibited by state law, and accordingly that their conduct could not be a part of a scheme to defraud and, hence, could not form the basis for a federal mail fraud prosecution. This claim was properly rejected by both the panel and the en banc court (Pet. App. 36a-42a).

It is axiomatic that "the concept of fraud in § 1341 is to be construed very broadly * * * [and that] any kind or species of scheme or artifice to defraud is punishable in the national courts, if and whenever for the purpose of executing that scheme the postal establishment is used." *United States* v. *States*, 488 F.2d 761, 764 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974), citing *Durland* v. *United States*, 161 U.S. 306 (1896). So too, it is clear that application of the statute does not depend on whether the particular fraudulent scheme constitutes a vio-

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[22] The court's instruction is described in the dissenting opinion of the panel (Pet. App. 72a).

lation of some other state or federal law. See, *e.g.*, *United States* v. *Brown*, 540 F.2d 364, 374 n.7 (8th Cir. 1976); *United States* v. *Bush*, *supra*, 522 F.2d at 646 n.6; *United States* v. *States*, *supra*, 488 F.2d at 767; *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1970); *United States* v. *Keane*, 522 F.2d 534, 544 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976).

As the panel noted (Pet. App. 40a), there are two ways in which concealment from or misrepresentation to government bodies constitutes fraud under the mail fraud statute. First, fraud exists if a public official fails to disclose his own personal interest in a matter about which he must take official action and thereby deprives the public of their right to honest, faithful, and disinterested government. As the court held in *United States* v. *Keane*, *supra*, 522 F.2d at 546:

> It is clear * * * that one who breaches the public trust by actively concealing a personal financial interest from the public and from a public body charged with the responsibility of passing judgment on matters directly affecting that financial interest, and on which he serves and in which he participates in the formulation of the collective judgment of that body, pursuant to his official duties, may be prosecuted for mail fraud.

Accord, *United States* v. *Brown*, *supra*, 540 F.2d at 375; *United States* v. *Bush*, *supra*, 522 F.2d at 652; *United States* v. *Barrett*, 505 F.2d 1091, 1104 (7th Cir. 1974), cert. denied, 421 U.S. 964 (1975). See

also *United States* v. *George*, 477 F.2d 508, 512-515 (7th Cir.), cert. denied, 414 U.S. 827 (1973); *Shushan* v. *United States*, 117 F.2d 110, 115 (5th Cir.), cert. denied, 313 U.S. 574 (1941). Thus, the fraudulent scheme needed to support a mail fraud conviction can be found in Mandel's failure to disclose the fact that he was receiving substantial personal benefits from those who would profit by the racetrack legislation that he was actively supporting in the course of his official duties.[23]

Alternatively, there is a "scheme or artifice to defraud" within the meaning of Section 1341 when any person receives a benefit by action of a public body

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[23] Contrary to petitioners' assertion (79-1029 Pet. 28; 79-1030 Pet. 24), *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), is inapposite. There the defendant, a state legislator, introduced members of an architectural firm who sought state construction contracts to state officials involved in the selection process. For this service, he received a retainer from the firm. In reversing a mail fraud conviction that resulted from this conduct, the court held, *inter alia*, that Rabbitt did not in his official capacity control the award of state contracts to architects. "There is no evidence that Rabbitt failed to carry out the duties and responsibilities of the legislative office for the sake of the [architectural firm]" *Id.* at 1026. In so holding, the *Rabbitt* court distinguished its earlier decision in *United States* v. *Brown*, *supra*, where "the conduct deemed fraudulent deprived the public * * * of its right to honest and fair dealing in the conduct of the officer in question" (583 F.2d at 1025 & n.20). Here, the introduction and support of legislation was squarely within the ambit of Mandel's official duties as Governor of the State of Maryland. Accordingly, the rationale of the *Rabbitt* case is inapplicable.

as a result of misrepresentation or deliberate concealment. As the panel noted (Pet. App. 41a):

> [T]he scheme to defraud can in such a case be said to encompass not only the receipt of the illicit benefit, but also the deprivation of the public of the right to have its officials act on other than false information.

See, *e.g.*, *United States* v. *Feinberg*, 535 F.2d 1004, 1008-1009 (7th Cir.), cert. denied, 429 U.S. 929 (1976); *United States* v. *Mirabile*, 503 F.2d 1065, 1066-1067 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975); *United States* v. *Flaxman*, 495 F.2d 344, 346-349 (7th Cir.), cert. denied, 419 U.S. 1031 (1974). Thus, the concealment and misrepresentation by Cory and other petitioners (acting as principals and aiders and abettors) concerning the identities of the actual owners of Marlboro and Bowie Racetrack in order to obtain benefits from the legislature and the State Racing Commission also fell within the prohibition of the mail fraud statute.

Petitioners Cory and Harry Rodgers nonetheless argue (79-1030 Pet. 21) that because the legislature and the State Racing Commission had previously condoned the practice of submitting the names of nominees in reporting racetrack ownership, and no law or regulation expressly required disclosure of actual ownership interests, their specific and repeated misrepresentations to the Commission were not fraudulent under Section 1341. Besides being factually unfounded (see pages 33-34, *infra*), this contention is nothing more than a claim that the fraud was not in

violation of any specific state law and that, in any event, the information would not have been important to the state authorities. However, neither of these grounds constitutes a defense to a mail fraud charge. See the cases cited on page 30, *supra*. See also *United States* v. *Reid*, 533 F.2d 1255, 1261 & n.24 (D.C. Cir. 1976) (collecting cases) (no need to prove reliance or injury); *United States* v. *Keane*, *supra*, 522 F.2d at 544-545. The gravamen of mail fraud is simply the formulation of a scheme to defraud and use of the mails in furtherance of the scheme. See, *e.g.*, *Pereira* v. *United States*, *supra*, 347 U.S. at 8.

While we agree that an innocent or negligent misrepresentation is not a violation of the statute, the trial judge's instructions fully assured that petitioners could not be convicted unless their misrepresentations were accompanied by the requisite fraudulent intent. Thus, the judge instructed that, while submission of false information to public officials may fall within the ambit of the mail fraud statute, such conduct is only an offense if it is part of a scheme to defraud that involves "intentional use of false * * * representations for the purpose of gaining a valuable undue advantage or working some injury" to others (Tr. 11488-11489). Thus, there is no possibility that petitioners were convicted for making innocent omissions in good faith reliance on the perceived policies of the Commission or the absence of specific disclosure regulations.

Moreover, the evidence establishes that Cory intentionally concealed the identities of the owners of

the racetrack enterprise and that the false information he provided the Racing Commission did in fact affect the Commission's deliberations. For example, in response to official inquiries concerning the identity of the beneficial owners of 175,000 shares of racetrack stock that Cory held as attorney, Cory submitted a letter to the Commission that concealed the ownership interests of Hess, William Rodgers, Harry Rodgers and Kovens (Tr. 6135, 6139-6140; Govt. Exh. 12 (App. 2927)). A Racing Commissioner testified that knowledge of the controlling interests in the racetrack enterprise was essential to proper execution of his duties and that, in making decisions concerning the Marlboro enterprise, he relied upon the false information provided by Cory (Tr. 6139, 6142-6144, 6153-6154). Hence, there is no merit to Cory's claim that the concealment was inconsequential.[24]

4a. Petitioners further contend (79-1029 Pet. 29-32) that Congress intended to limit application of the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, to persons shown to be professional racketeers or involved in organized crime, and that in the absence of proof that they were such persons, they were improperly convicted under the

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[24] Racing Commissioner Jackson testified that he was quite interested in learning who the true owners of the track were (Tr. 6135, 9868). Here, of course, the evidence showed not only that petitioners concealed their identities by use of a nominee, but also that they affirmatively misrepresented the relevant facts after repeated specific requests for truthful information.

statute.[25] This contention, which has been rejected by every court to have considered it, is without merit.[26] It is essentially the same as the claim rejected by this Court in *United States* v. *Culbert*, 435 U.S. 371 (1978), in the context of the Hobbs Act.

While the stated purpose of the Organized Crime Act, of which the RICO statute is a part, is to eradicate organized crime, the statute does not require proof that the defendant is connected with organized crime. *United States* v. *Aleman*, 609 F.2d 298, 304 (7th Cir. 1979), petition for cert. pending, No. 79-1009. It is the defendant's behavior, not his status, that is determinative. See, *e.g.*, *United States* v. *Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v.

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[25] Mandel was convicted on Count 21, which alleged that he "directly and indirectly, acquired and maintained an interest in and control of the Security Investment Company through a 'pattern of racketeering activity,' including mail fraud and bribery," in violation of 18 U.S.C. 1962(b). The remaining petitioners were convicted on Count 24, which alleged that they "conducted and participated, directly and indirectly, in the conduct of the affairs of the Marlboro Race Track through a 'pattern of racketeering activity', including mail fraud," in violation of 18 U.S.C. 1962(c). App. 31, 37.

[26] See *United States* v. *Aleman*, 609 F.2d 298, 302-305 (7th Cir. 1979), petition for cert. pending, No. 79-1009; *United States* v. *Campanale*, 518 F.2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Chovanec*, 467 F. Supp. 41, 44-45 (S.D. N.Y. 1979); *United States* v. *Vignola*, 464 F. Supp. 1091, 1096 (E.D. Pa. 1979); *United States* v. *Mandel*, *supra*, 415 F. Supp. at 1018. See also *United States* v. *Forsythe*, 560 F.2d 1127, 1135-1136 (3d Cir. 1977).

Campanale, 518 F.2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). Thus, on its face Section 1962(b) punishes anyone who, through a "pattern of racketeering activity," maintains an interest in or control over any enterprise engaged in interstate commerce. Similarly, Section 1962(c) prohibits anyone from conducting the affairs of an enterprise engaged in interstate commerce through a "pattern of racketeering activity." In turn, "racketeering activity" is defined to include the violation of a number of state and federal criminal statutes, including the federal mail fraud statute. See Section 1961(1). In short, Congress has enacted a comprehensive statutory scheme designed to punish "any person" who engages in a pattern of proscribed racketeering activity. Nothing on the face of the statute suggests that, in addition to these requirements, its application is limited to persons engaged in organized crime. See *United States* v. *Campanale*, *supra*, 518 F.2d at 364.

Although recourse to legislative history is unnecessary since the statute clearly defines the conduct it prohibits, it is equally apparent that the statute's drafters intended to punish "any person" falling within the statutory prohibition regardless of whether the person was affiliated with organized crime. While Congress' primary concern in enacting the statute was to prevent the corruption of business enterprises by organized crime (see Congressional Statement of Findings and Purpose, Pub. L. No. 91-452, Section 1,

84 Stat. 922, 18 U.S.C. 1961 note), Congress also made it clear that the statute "shall be liberally construed to effectuate its remedial purposes" (Pub. L. No. 91-452, Section 904, 84 Stat. 947, 18 U.S.C. 1961 note). In keeping with its desire to promote the liberal application of the statute, Congress flatly rejected suggestions that a definition of organized crime be added to the statute (see 116 Cong. Rec. 35343-35344 (1970)) in order to provide the Attorney General maximum flexibility in effectuating its broad objectives (*id.* at 35302 (remarks of Rep. Celler)). Congress' actions offer convincing evidence that it did not intend that a connection with organized crime be demonstrated as a prerequisite to conviction. *United States* v. *Mandel, supra*, 415 F. Supp. at 1019.[27]

b. Petitioners also argue (79-1029 Pet. 32-33) that imposition of multiple punishments[28] for violation of the RICO statute and the commission of predicate offenses is impermissible under the Double Jeopardy Clause. However, petitioners did not raise this point in the court of appeals. Accordingly, they

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[27] Indeed, if Congress had intended that membership in organized crime be an element under the racketeering statute, it certainly would have defined "organized crime." Without a definition, "the highly subjective and prejudicial connotations of that term[], would simply render the statute unenforceable, a result plainly not in the contemplation of Congress." *United States* v. *Mandel, supra*, 415 F. Supp. at 1018; see also *United States* v. *Culbert, supra*, 435 U.S. at 374.

[28] While petitioners' prison sentences were concurrent, those petitioners who were fined received separate fines on the mail fraud and racketeering counts (Sentencing Tr. 120, 128-129, 136-137, 161, 168).

are barred from pursuing it now in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

This issue resembles that currently before the Court in *Whalen* v. *United States*, No. 78-5471 (argued Nov. 27-28, 1979), which concerns the permissibility of consecutive sentences for felony murder and for a rape that constituted the predicate offense upon which the felony murder conviction was based. Here, as in *Whalen*, the offenses appear to be separate under the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), since the compound offense (conduct of an enterprise by racketeering or felony murder) and the predicate offenses (various specified felonies such as mail fraud or rape) each contain unique elements not shared by the other; at the same time, with the RICO statute as with felony murder, proof of the compound felony requires proof of the commission of one or more of a specified class of predicate offenses. See *United States* v. *Solano*, 605 F.2d 1141, 1144-1145 (9th Cir. 1979), cert. denied, No. 79-5541 (Jan. 7, 1980); see also *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

Regardless of the disposition of *Whalen*, however, there is no occasion for this Court to address the issue in the present case or to hold the case for *Whalen*, in view of the failure of petitioners to raise the issue below. Petitioners will not be remediless if review is denied here but *Whalen* is decided in a manner that lends force to their contentions, since petitioners

would be free at any time to move in the district court under Fed. R. Crim. P. 35 or 28 U.S.C. 2255 to correct their sentence if it is indeed illegal.[29]

5. Petitioners also assert (79-1029 Pet. 33-37) that the forfeiture of their ownership interests in Marlboro Racetrack pursuant to 18 U.S.C. 1963 (Count 24)[30] constituted a forfeiture of estate prohibited by the Constitution[31] and federal statute (18 U.S.C. 3563). The contention is insubstantial.

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[29] We note that, even if the government's contentions were to be rejected in *Whalen*, it by no means follows that petitioner's sentences are defective. In *Whalen*, the felony murder conviction was based upon a single underlying felony; on the facts of the case, therefore, the proof of that felony was in a sense necessary to sustain the felony murder charge. Here, by contrast, while only two acts of racketeering are statutorily required to sustain a RICO charge, far more than two were in fact charged and proved. The impact of this distinction in the particular circumstances of this case would plainly be a matter best addressed in the first instance by the district court.

[30] 18 U.S.C. 1963 provides in pertinent part:

> (a) Whoever violates any provision of section 1962 of this chapter * * * shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in * * * or property * * * of any kind affording a source of influence over, any enterprise which he has established operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

[31] United States Constitution, Art. III, Sec. 3, provides in part:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

The common law doctrine of forfeiture of estate required forfeiture to the sovereign of all the defendant's estate and chattels upon conviction of treason and certain other felonies. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). By contrast, as the Senate Committee on the Judiciary noted in explaining Section 1963, "the concept of forfeiture as a criminal penalty [is] limited * * * in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and [does] not extend[] to any other property of the convicted offender * * *." S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969). The Committee emphasized that the purpose of the forfeiture statute was to divest persons engaged in organized criminal activity of their interests in organizations acquired or operated by racketeering methods. *Id.* at 79-80. See *United States* v. *Rubin*, 559 F.2d 975, 991-992 (5th Cir. 1977).[32]

As petitioners acknowledge (79-1029 Pet. 34), there is nothing novel about forfeiture statutes directed at such objectives. Following enactment of the Constitution, statutes providing for *in rem* forfeiture of property were enacted to reach many types of property used in the conduct of criminal enterprises. See, *e.g.*, 15 U.S.C. 6; 21 U.S.C. 824(f); 26 U.S.C. 7301;

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[32] Thus, this case does not involve the issue discussed by petitioners (79-1029 Pet. 36) whether due process proscribes forfeiture of property that has not been used in any criminal activity. Indeed, petitioners do not even suggest that there was an insufficient nexus between Marlboro Racetrack and the criminal activity alleged in the indictment.

49 U.S.C. 781-782. Because the object of *in rem* forfeiture proceedings is to penalize the commission of an offense against the law, such proceedings are quasi-criminal in character. *One Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965). This Court has repeatedly upheld application of such *in rem* forfeiture statutes even when, unlike the present case, they impose a penalty on an owner of property who has not used the property for criminal purposes. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 683; *Goldsmith-Grant* v. *United States*, 254 U.S. 505, 510-513 (1921).

It is immaterial that RICO imposes a forfeiture directly upon the offender following his conviction, rather than in a separate *in rem* proceeding brought against the offending property. Insofar as both procedures are designed to penalize the commission of an offense and result in forfeiture of property related to the criminal enterprise, "there is no substantial difference between an *in rem* proceeding and a forfeiture proceeding brought directly against the owner." *United States* v. *Huber*, 603 F.2d 387, 397 (2d Cir. 1979), petition for cert. pending, No. 79-896; see also *United States* v. *L'Hoste*, *supra*, 609 F.2d at 813 n.15; cf. *Shaffer* v. *Heitner*, 433 U.S. 186, 207 & n.22 (1977).

There is no substance to petitioners' claims (79-1029 Pet. 36-37) that application of the RICO forfeiture statute constitutes cruel and unusual punishment. In rejecting an identical Eighth Amendment

claim, the court held in *United States* v. *Huber*, *supra*, 603 F.2d at 397:

> We do not say that no forfeiture sanction may ever be so harsh as to violate the Eighth Amendment. But at least where the provision for forfeiture is keyed to the magnitude of defendant's criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime.

6. Although not admissible under any specific exception to the hearsay rule, the trial judge admitted into evidence the hearsay statements of several state senators regarding Mandel's views on the veto override. The trial judge admitted these statements pursuant to the residual exception to the hearsay rule contained in Fed. R. Evid. 803(24).[33] Petitioners contend (79-1029 Pet. 37-40) that these evidentiary rulings constitute an improper dilution of

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[33] Senators Crawford and Thomas testified that they had short discussions with Senator Roy Staten, Mandel's chief spokesman in the Senate, immediately prior to the override vote and that Staten stated that Mandel would like the veto overridden or that Mandel would not object to an override (Pet. App. 80a; Tr. 4842-4843, 5248-5249). In addition, Senator Lapides testified that he based his conclusion that Mandel wanted the veto overridden on his knowledge of the change in track ownership and a conversation he had with Senator Mitchell (Tr. 5002-5003). Finally, Senator Coollahan testified that, based upon a conversation with other unidentified senators, he felt Mandel did not care about an override of his veto (Tr. 5670-5677).

the hearsay rule. However, Rule 803(24) plainly allows the introduction of declarations that do not fall within other specific exceptions to the hearsay rule if there are "equivalent circumstantial guarantees of trustworthiness" and if the court determines that

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The trial court did not abuse its discretion under these standards. See, *e.g.*, *United States* v. *Friedman*, 593 F.2d 109, 118-119 (9th Cir. 1979); *United States* v. *Bagley*, 537 F.2d 162, 166-167 (5th Cir. 1976), cert. denied, 429 U.S. 1075 (1977).

a. It is well recognized that extrinsic corroborative evidence is sufficient to satisfy the "trustworthiness" requirement of Rule 803(24). See *United States* v. *Garner*, 574 F.2d 1141, 1144-1146 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *West*, 574 F.2d 1131, 1134-1135 (4th Cir. 1978); *United States* v. *Ward*, 552 F.2d 1080, 1083 (5th Cir.), cert. denied, 434 U.S. 850 (1977).[34] In the

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[34] These cases involved the admission of declarations under Fed. R. Evid. 804(b)(5), a companion residual exception that permits admission of certain hearsay statements when the declarant is unavailable. The same standards apply under Rule 803(24). See *United States* v. *Carlson*, 547 F.2d 1346, 1353 n.3 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); 4 *Weinstein's Evidence* ¶ 804(b)(5)[01] (1975).

present case, there was ample corroboration of the out-of-court declarations of the senators that Mandel was not opposed to a veto override. For example, when the Senate Majority Leader requested guidance from one of Mandel's lobbyists concerning the administration's position on the override, the lobbyist did not urge support for the Governor's veto but instead simply shrugged his shoulders and walked away (Tr. 4594-4595). Moreover, a number of senators testified that, contrary to custom, there was a conspicuous absence of lobbying that day by Mandel's aides to obtain support needed to sustain his veto (Tr. 5309-5310, 5601, 5669-5670, 6311, 6364; Pet. App. 83a). While an override of any of Mandel's vetoes was highly unusual, the veto of House Bill 1128 was overridden by a surprisingly large majority that included Mandel's closest supporters, who voted as a bloc (Tr. 4597, 5010-5012, 5310, 5769). Indeed, several of these supporters originally voted against the bill but, following Mandel's veto, voted to override the veto and make the bill into law (Tr. 5011). Finally, Kovens, a longtime friend of Mandel, lobbied on behalf of the veto override (Tr. 6310).

While these facts clearly corroborate the hearsay statements of the senators—statements that were mutually supportive of each other—the circumstances under which the statements were made also demonstrate that the senators had an incentive to speak truthfully and no reason to misrepresent the facts. See, *e.g.*, *United States* v. *McPartlin*, 595 F.2d 1321, 1350 (7th Cir. 1979), cert. denied, No. 78-1751

(Oct. 1, 1979); *United States* v. *Friedman*, *supra*, 593 F.2d at 119; *United States* v. *Leslie*, 542 F.2d 285, 290 (5th Cir. 1976); *United States* v. *Iaconetti*, 406 F. Supp. 554, 558-560 (E.D.N.Y.), aff'd, 540 F.2d 574, 577-578 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977). Thus, the principal declarant, Senator Staten, was recognized as the leading spokesman for the administration's position on the Senate floor (Pet. App. 83a). His statements concerning the administration's position on the veto override were not likely to be ill-informed or biased. Moreover, all of the statements were made and overheard almost contemporaneously with the declarant's perception of Mandel's acquiescence in the veto override. This circumstance made a calculated misstatement unlikely. See *United States* v. *Medico*, 557 F.2d 309, 315-316 (2d Cir. 1977); *United States* v. *Iaconetti*, *supra*, 406 F. Supp. at 559. Thus, as Judge Butzner noted in his dissent from the panel decision (Pet. App. 82a), "the statements were quite like the hearsay declarations of present sense impression admissible under Rule 803(1)." [35]

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[35] There is no factual basis for the assertion of the panel majority that "[s]ome of the most damaging hearsay statements were repeated by long-time political enemies of the Governor. Further, the statements were made on and around the Senate floor in the heat of political battle, where rumors, opinion and gossip abound" (Pet. App. 51a-52a).

Only one of the government's witnesses, Senator Lapides, classified himself as a political opponent of the administration, and he volunteered that Mandel had been an excellent governor in many respects (Tr. 5159). While the defense attempted to demonstrate that Senator George Snyder was also biased against Mandel, Senator Snyder did not present any

Most importantly, the availability of the declarants to testify at trial provided a strong guarantee of the "trustworthiness" of the declarations. See *United States* v. *Leslie, supra*, 542 F.2d at 290; *United States* v. *Iaconetti, supra*, 540 F.2d at 577-578. All the senators present on the day of the veto override, with the exception of two who died before trial, were available as witnesses. In fact, 17 of the surviving 38 senators, including Senator Staten, actually testified.[36] Thus,

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damaging hearsay testimony. Senator Thomas, one of the senators who quoted Senator Staten with respect to Mandel's position on the veto override, testified that his relationship with Mandel had been "very cordial and friendly" (Tr. 5242).

Similarly, nothing in the record supports the statements of the panel majority (Pet. App. 51a-52a) that the hearsay statements were made while the legislature was in a state of confusion. While there was some testimony concerning confusion in the legislature on the last day of the legislative session, when the consolidation bill failed to reach a vote, the record does not show that a similar state of affairs existed on the first day of the session, when the veto override was considered. In fact one senator described the circumstances of the veto override as "onesided" and "routine" (Tr. 4593). Finally, none of the facts surrounding the hearsay statements here in question even suggests that they were made in the heat of political battle. The most damaging declarations were made by Mandel's floor leader to other senators while conveying the administration's position on the override (Pet. App. 80a).

[36] Senator Staten testified as a defense witness. He denied making the declarations attributed to him and denied ever speaking with Mandel on the veto override (Pet. App. 83a).

In view of the testimony presented by the out-of-court declarants and their availability as witnesses, there is no merit to petitioners' suggestion (79-1029 Pet. 38) that the admission of the hearsay testimony raises a possible violation of the Confrontation Clause. See *California* v. *Green*, 399 U.S. 149, 160-161 (1970).

there was ample opportunity for cross-examination of the senators who made out-of-court statements about the circumstances of the veto override.

b. Petitioners nonetheless contend (79-1029 Pet. 37-38) that the declarations should have been excluded because the government failed to advise them in advance of trial of its intention to introduce the statements, as required by Rule 803(24). However, as Judge Butzner noted in his dissent from the panel decision (Pet. App. 85a), petitioners "had adequate notice of the government's intention to proceed as it did". At an in-chambers conference during the first trial, the court ruled that the senators' hearsay testimony was admissible and required the government to furnish petitioners with copies of the transcripts of the senators' grand jury testimony. Thus, although the government could not give petitioners the names of certain out-of-court declarants whose identities it did not know and could not learn through reasonable investigation, it provided them with the relevant information in its possession and alerted them to the substance of the out-of-court declarations—information that permitted them to fashion their defense.[37] At the in-chambers conference in the district court,

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[37] The panel majority noted (Pet. App. 51a) that the government could not give the names and addresses of several out-of-court declarants whose identities could not be recalled. However, the defense was fully apprised of the substance of their statements. Moreover, their statements merely repeated the statements made by Senator Staten. In situations in which the declarant's address and name are unknown despite reasonable efforts to locate him, it is sufficient to dis-

both defense counsel and the trial judge acknowledged that the transmission of the transcripts to defense counsel fulfilled the purpose of the notice requirement of Rule 803(24) (see pages 3612-3613 of the first trial transcript).[38]

7. Finally, petitioners contend (79-1029 Pet. 40-41) that the trial court erred in giving a modified *Allen* instruction.

Following seven days' deliberation, the court was notified by the jury foreman that the jury was unable to reach a unanimous decision (Tr. 11709-11710).

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close the information the proponent has been able to acquire by reasonable inquiry. 4 *Weinstein's Evidence, supra,* ¶ 803 (24) [01], at 803-243. See *United States* v. *Medico, supra,* 557 F.2d at 316.

[38] Thus, there is no substance to petitioners' claim (79-1029 Pet. 38) that the holding of the en banc court conflicts with the decisions of other circuits. In *United States* v. *Oates,* 560 F.2d 45 (2d Cir. 1977), the court noted that "the defense was unaware that the chemist's report and worksheet would be offered in lieu of the testimony of [the chemist] himself" (*id.* at 72 n.30). Similarly, in *United States* v. *Davis,* 571 F.2d 1354 (5th Cir. 1978), the court noted that "the Government made no attempt [to give] the * * * defense the required advance notice of the hearsay evidence to be offered at trial" (*id.* at 1360 n.11). And in *United States* v. *Ruffin,* 575 F.2d 346 (2d Cir. 1978), the court held that despite the failure of the government to give any pretrial notice, error in the admission of the hearsay testimony was harmless (*id.* at 357-359). Finally, in *United States* v. *Lyon,* 567 F.2d 777 (8th Cir. 1977), cert. denied, 435 U.S. 918 (1978), the court held that strict compliance with the notice rule is not required where, as here, the defendant was aware of the hearsay declarant's identity prior to trial and knew the substance of the declarant's statement. *Id.* at 784, citing *United States* v. *Carlson, supra,* 547 F.2d at 1355.

The court then assembled the jury and gave a modified *Allen* instruction.[89] After continuing deliberations for an additional six days, the jury returned its verdict (Tr. 11773).

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[89] In its entirety, the instruction stated as follows (Tr. 11710-11711):

> Members of the jury, in order to return a verdict, each juror must agree to the verdict. In other words, your verdict must be unanimous. Jurors have a duty to consult with one another and to deliberate with a view of reaching an agreement, if it can be done without violence to individual judgment. Although each juror must decide the case for himself or herself, this should only be done after an impartial consideration of the evidence with his or her fellow jurors.
>
> In the course of deliberations, a juror should not hesitate to re-examine his or her own views and change his or her opinion if convinced it is erroneous. Each juror who finds himself to be in the minority should reconsider his views in the light of the opinions of the majority. Conversely, each juror who finds himself or herself in the majority should give equal consideration to the views of the minority. No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors for the purpose of returning a verdict. But remember also, after full deliberation and consideration of all the evidence, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and conscience.
>
> For the parties that are involved in this lawsuit, the Government and the Defendants, this case is an important one and its presentation to you has involved expense and expenditure of time by both the Government and the Defendants.
>
> Now, Mister Foreman and members of the jury, please retire and further deliberate.

This Court has consistently declined to review claims similar to those presented by petitioners (see, *e.g.*, *Lacey* v. *United States*, cert. denied, 439 U.S. 832 (1978); *United States* v. *Dyba*, 554 F.2d 417 (10th Cir.), cert. denied, 434 U.S. 830 (1977); *Perez-Vega* v. *United States*, cert. denied, 424 U.S. 970 (1976)), and there is no reason for a different result here. The instruction given by the trial judge was carefully balanced. It emphasized the responsibility of both the majority and the minority jurors to reexamine their views from the perspective of the opposing viewpoint. It also made it clear that, while it was the jury's responsibility to return a verdict if possible, no juror should surrender his or her honest convictions simply to achieve unanimity (Tr. 11710-11711).[40] Indeed, that the jurors here diligently per-

[40] Accordingly, there is no conflict between the decision below and the cases on which petitioners rely (79-1029 Pet. 41). In *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969), the court's principal criticism of the *Allen* charge given by the trial judge was that it contained no balancing admonition that the majority reexamine its position from the perspective of the views of the minority, and that it imposed a premium upon reaching a unanimous verdict at the expense of conscientiously held views. *Id.* at 414-417. Neither of these factors is present here. Notwithstanding these criticisms, the court affirmed the conviction but precluded future use of the *Allen* charge in an exercise of its supervisory power (*id.* at 420). In *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), the court of appeals expressly approved the use of "carefully worded and timed supplemental instructions" (*id.* at 932) when a jury is unable to reach a verdict. The court adopted the instruction recommended by the American Bar Association in an exercise of its supervisory power. Finally, in

formed their duties free of any coercive influence is manifest from the fact that they deliberated an additional six days before reaching a verdict.[41]

CONCLUSION

The petitions for a writ of certiorari and a writ of mandamus should be denied.

Respectfully submitted.

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MARCH 1980

United States v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971), the court reversed the defendants' convictions because the trial judge added unduly coercive comments to an otherwise permissible *Allen* charge. *Id.* at 1180-1184. As in *Brown*, the court announced adoption of the American Bar Association model instruction.

[41] Indeed, after five days of additional deliberation, the jury requested portions of the transcript to facilitate its effort to reach a verdict. The trial judge declined to follow suggestions from petitioners' counsel that further inquiry be made regarding the status of the jury's deliberations (Tr. 11727, 11736).

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